

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

the Commission's Forfeiture  
Policy Statement and  
Amendment of Section 1.80  
of the Rules to Incorporate  
the Forfeiture Guidelines

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CI Docket No. 95-6

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To: The Commission

COMMENTS  
OF THE  
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

Respectfully submitted,

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ASSOCIATION, INC.

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March 27, 1995

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The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), pursuant to Section 1.415 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully submits its Comments in the above-entitled proceeding.<sup>1/</sup> The Association supports the Commission's proposal to incorporate in its rules guidelines for assessing FCC forfeitures. However, AMTA recommends that those guidelines be modified both to reflect sub-categories of the broad licensee classifications identified and to clarify the meaning of certain violations.

## I. INTRODUCTION

AMTA is a nationwide, non-profit trade association dedicated to the interests of the specialized wireless communications industry.<sup>2/</sup> The Association's members include trunked and conventional 800 MHz and 900 MHz SMR operators, licensees of wide-area SMR systems, and commercial licensees in the 220 MHz band. These members provide commercial wireless services throughout the country. The systems they operate are classified by the FCC as Private Mobile Radio Service ("PMRS") or Commercial Mobile Radio Service ("CMRS"), the latter being considered a sub-category of common carrier service.<sup>3/</sup> Because each of these members could be affected by the forfeiture guidelines

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<sup>1/</sup> In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Notice of Proposed Rulemaking, CI Docket No. 95-6, FCC 95-24 (adopted January 13, 1995, released February 10, 1995)("Notice" or "NPR").

<sup>2/</sup> These entities had been classified as private carriers prior to the 1993 amendments to the Communications Act. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002 (b), 107 Stat. 312, 392 ("Budget Act").

<sup>3/</sup> See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1418 (1994) ("CMRS 2nd R&O"), Erratum, 9 FCC Rcd 2156 (1994); Third Report and Order, 9 FCC Rcd 7988 (1994)("CMRS 3rd R&O"), Erratum, 9 FCC Rcd \_\_\_\_\_ (1994).

proposed in the Notice, AMTA has a significant interest in the outcome of this proceeding.

## II. FORFEITURE POLICY STATEMENT AND GUIDELINES

### A. BACKGROUND

In 1991, the Commission adopted a Policy Statement in which it identified standards for assessing fines for a variety of violations of the agency's rules.<sup>4/</sup> That Policy Statement was set aside by the United States Court of Appeals for the District of Columbia Circuit<sup>5/</sup> which found that the Policy Statement, as implemented by the Commission, had the status of a rule, but that the FCC had failed to follow the dictates of the Administrative Procedures Act in its adoption.<sup>6/</sup> The Court did not challenge the Commission's authority to adopt the Policy Statement at issue, only the legality of the procedures followed. Notice at ¶ 5.

The instant Notice proposes to adopt forfeiture guidelines identical to those set out in the 1993 version of the Forfeiture Policy Statement, with the proviso that the agency will retain discretion to reach decisions in specific instances based on the particular facts and equities at issue. Notice at ¶ 5. The FCC posits that adoption of such a schedule would promote equitable treatment of similarly situated offenders, and would provide the public with clearer guidance regarding the likely forfeitures for various

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<sup>4/</sup> Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon. denied, 7 FCC Rcd 5339 (1992), revised, 8 FCC Rcd 6215 (1993) ("Forfeiture Policy Statement").

<sup>5/</sup> United States Telephone Association v. FCC, 28 F. 3d 1232 (D.C. Cir. 1994).

<sup>6/</sup> See 5 U.S.C. § 553(b).

violation. Notice at ¶ 3. The NPR also suggests that use of forfeiture guidelines would increase administrative efficiency, would be consistent with a recommendation of the Administrative Conference of the United States ("ACUS"), and would be comparable to approaches already used by other regulatory agencies.<sup>71</sup> Notice at ¶ 3.

Nonetheless, the NPR seeks comments on the benefits and disadvantages of employing forfeiture guidelines at all versus proceeding on a case-by-case situation in each instance. Notice at ¶ 4. It also questions whether the fines proposed would impact certain classes of licensees disproportionately. Id. It further queries whether the specific base amounts, adjustment factors and adjustment factor ranges are reasonable. Id.

#### **B. ADOPTION OF FORFEITURE GUIDELINES IS APPROPRIATE**

AMTA supports adoption of forfeiture guidelines along the lines of those proposed in the Notice with the understanding that they will be used as recommendations against which particular violations will be measured, rather than absolute precepts. In general, the Association believes that it is beneficial for parties to have some concept of the seriousness with which various violations are perceived by the Commission, and the severity of the forfeiture guidelines associated with them. It is also useful for parties to have a benchmark against which assessed fines can be evaluated since the outcomes of most forfeiture proceedings are not published by the Commission. Application of guidelines, such as those suggested in the Notice, will provide parties with some greater assurance that the Commission's processes are impartial and equitable. As long as the

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<sup>71</sup> See ACUS, Agency Assessment and Mitigation of Civil Money Penalties, Recommendation No. 79-3; 10 C.F.R. Chapt. 1, Part 2, App. C (General Statement of Policy and Procedure for NRC Enforcement Actions)(1994).

FCC retains discretion to consider each purported violation of its rules independently, the rights of the Association's members will be protected adequately.

**C. THE FORFEITURE GUIDELINES SHOULD DISTINGUISH  
AMONG VARIOUS CLASSES OF COMMON CARRIERS**

The proposed guidelines for assessing FCC forfeitures establish a base amount for various violations for each of three broad classes of licensees: Broadcast and Cable operators, Common Carriers, and Others. These amounts are based on the forfeiture ceilings per violation, or per day for a continuing violation, as specified in Section 503 of the Communications Act.<sup>8/</sup> The guidelines also include upward and downward adjustment factors intended to reflect more accurately the specific facts surrounding a particular licensee and the actual violation.

The forfeiture ceiling applicable to common carriers under the Communications Act is four times as high as the ceiling for broadcast or cable operators, and ten times the ceiling for other, miscellaneous licensee categories. Thus, in virtually every instance, the forfeiture guideline for a violation by a common carrier is substantially higher than it would be were the violation committed by another class of operator. In AMTA's opinion, those differences reflect a categorization of Commission licensees that is no longer valid. Myriad changes in the telecommunications industry have blurred some of those previously "bright line" distinctions. Common carriers may soon be providing "broadcast" services on a widescale basis, and broadcasters are lobbying for unprecedented flexibility in the service offerings that might be provided on spectrum

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<sup>8/</sup> 47 U.S.C. § 503.

allocated to accommodate High Definition Television. It is not clear in these instances whether the applicable guideline would be determined by the class of licensee or the particular service being provided, although the latter approach appears more consistent with the objective of the instant proposal.

AMTA is particularly concerned about the Commission's failure to distinguish among the many sub-categories of licensees now classified as common carriers for purposes of forfeiture guidelines. As the FCC is aware, this classification now includes a broad variety of operators, with businesses ranging from the most modestly sized to more substantial companies, in addition to the local exchange and long distance carriers considered at the time the forfeiture ceiling was established. Most common carriers do not provide an essential, monopoly service on which vast segments of the population are dependent, wherein an FCC violation may have a far-reaching impact. Instead, most operate in highly competitive marketplaces with subscribers free to select among a variety of offerings capable of satisfying their requirements. These common carriers possess neither the national importance, nor the market power, nor the financial wherewithal of an RBOC or AT&T. For this reason, they should not be considered as comparable under the FCC's forfeiture guidelines.

Specifically, the FCC should adopt different, more appropriate base amounts for the newly-created CMRS industry, in particular for those entities reclassified from PMRS (Other) to CMRS status by the Budget Act. The Commission has already determined that it was granted broad flexibility by Congress to identify different classes of CMRS for purposes of deciding whether to forbear from Title II regulation of these newly-

defined "common carriers".<sup>9/</sup> The FCC has already exercised that discretion by adopting CMRS-specific requirements for a variety of purposes, rather than subjecting those offerings and operators to the full panoply of "traditional" common carrier regulation.<sup>10/</sup> A similar approach should be adopted in the instant proceeding.

Therefore, AMTA recommends that CMRS be identified specifically as a distinct sub-category of common carrier licensee, and that the base forfeitures for such entities be comparable to those applicable to Others. A significant percentage of CMRS entities were previously classified as PMRS and operate systems with an amount of spectrum and geographic scope more comparable to those still categorized as PMRS than to traditional common carriers. This delineation would be consistent with the FCC's treatment of CMRS for other regulatory purposes, and would reduce the number of instances in which the Commission would need to utilize a substantial downward adjustment factor based on the entity's ability to pay.

#### **D. THE FCC SHOULD CLARIFY THE DEFINITION OF VARIOUS VIOLATIONS**

While the Association would prefer somewhat lower forfeiture guidelines across-the-board, it would accept CMRS standards consistent with those applicable to Other

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<sup>9/</sup> CMRS 2nd R&O at ¶¶ 162-257.

<sup>10/</sup> See e.g. In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Stations, Notice of Proposed Rulemaking, GN Docket No. 94-54, 9 FCC Rcd 5408 (1994); In the Matter of Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, Notice of Proposed Rulemaking, GN Docket No. 94-33, 9 FCC Rcd 2164 (1994); and In the Matter of the Commission's rules to ensure compatibility with enhanced 911 emergency calling systems, Notice of Proposed Rulemaking, GN Docket No. 94-102, 9 FCC Rcd 6170 (1994).

licensees, with the understanding that the FCC will continue to apply its downward adjustment criteria reasonably, considering, in particular, the licensee's ability to pay. Those forfeiture base amounts suggested are substantial enough to promote broad compliance with the FCC's rules without causing undue hardship for parties found guilty of inadvertent violations which do not cause substantial harm to other licensees or the public.

However, AMTA recommends that the FCC clarify or reconsider which actions would fall within what appear to be overlapping or duplicative violations. For example, the guidelines include the following, distinct violations and forfeiture guidelines:

Construction and/or operation without an instrument of authorization for the service	\$8,000
Using unauthorized frequency	\$4,000
Construction or operation at unauthorized location	\$2,000

If a Specialized Mobile Radio ("SMR") licensee was authorized to operate in the Washington, D.C. area and initiated service in Annapolis on different frequencies prior to the grant of an FCC authorization to do so, it is not clear which of the violations above would be applicable. Moreover, since the Commission's overall regulatory scheme is designed in large part to prevent interference between entities, it is not obvious why operation without any license at all would be considered conduct four times as egregious as having a license but operating at a location not covered by the authorization. It is equally inexplicable that operating on an unauthorized frequency would be considered



only half as serious as the former, but twice as serious as the latter.

Therefore, AMTA recommends that the Commission reconsider and simplify the proposed classes of violations relating to the actual operation of a station. In general, an entity either has the authority to operate at a particular location on a particular frequency or it does not. If it does not, the likelihood or actuality of causing interference to another licensee should dictate the seriousness of the violation and the severity of the fine. Similarly, if a party has the requisite FCC approval, but does not operate in accordance with the terms of that authorization, the Commission should focus on the interference potential of the matter. While the Association appreciates the importance of licensees complying with all applicable regulations, and recognizes the need to address appropriately all failures to do so, it urges the Commission to distinguish clearly between essentially ministerial/administrative violations and those with the potential for disturbing or disabling the operation of communications facilities by other entities, and to reflect those distinctions in the agency's forfeiture guidelines.

### **III. CONCLUSION**

AMTA supports the Commission's proposal to incorporate by rule its Forfeiture Guidelines. The Association recommends, however, that the FCC establish a distinct CMRS sub-category within the Common Carrier classification, and that it adopt guidelines for that category comparable to those for Other licensees. AMTA also urges the FCC to clarify, and when possible to simplify, the variety of violations identified in the guidelines.

For the reasons described above, AMTA urges the Commission to proceed expeditiously to complete this proceeding, consistent with the recommendations detailed herein.

## **CERTIFICATE OF SERVICE**

I, Cheri Skewis, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify that I have, on this 27th day of March, 1995, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing Comments to the following:

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